

*United States Court of Appeals
for the
District of Columbia Circuit*



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FOR THE
DISTRICT OF COLUMBIA

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BRIEF FOR APPELLANT

In the
UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 19,915

669

LEROY M. GRAY,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District
Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 8 1966

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i.

QUESTIONS PRESENTED

1. Whether appellant was seriously prejudiced and his substantial rights affected by the failure of the District Court to sever his trial from that of Abraham Logan, Jr.
2. Whether the jury was misled and confused by the District Court's instruction permitting them to infer from the fact that appellant was a passenger in Logan's automobile, in the locked trunk of which recently stolen property was found, that appellant was guilty of robbery.
3. Whether the first count of the indictment, which failed to allege that appellant intended wrongfully to deprive another person of his property, charged the crime of robbery for which appellant was convicted.
4. Whether the District Court's failure to appoint an attorney to represent appellant at his arraignment and for 52 days thereafter deprived appellant of his constitutional right to the assistance of counsel and requires reversal of his convictions.

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In the
UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 19,915

LEROY M. GRAY,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant was charged in three counts of a single indictment with robbery, assault with a dangerous weapon and carrying a dangerous weapon without a license, in violation, respectively, of 22 D.C. Code §§ 2901, 502 and 3204. He entered a plea of not guilty to each count. On October 5, 1965, a jury found him guilty as charged, and he was sentenced to concurrent prison terms of 30 to 90 months for robbery, 20 to 60 months for assault with a dangerous weapon, and 1 to 3 years for carrying a dangerous weapon without a license. On November 10, 1965, appellant was granted leave by the District Court to appeal in forma pauperis. Notice of Appeal was filed on November 24, 1965. This Court's jurisdiction is

founded upon 28 U.S.C. § 1291.

STATEMENT OF THE CASE

1. Pretrial Proceedings. Appellant was jointly indicted, jointly arraigned and jointly tried with Abraham Logan, Jr. The indictment was returned on May 17, 1965, while appellant was free on bail. Upon arraignment on May 28, 1965, appellant indicated a desire to retain a lawyer although he didn't yet have sufficient funds. The District Court advised him, as well as Logan, to obtain counsel right away since trial would take place the week of July 12. Upon second thought, however, the Court declared that it would assign lawyers for them. One of the defendants, which one is not reported, stated that he had already made a payment to an attorney. The Court, reconsidering, gave each defendant a week to retain a lawyer or counsel would be appointed. Both defendants, without counsel,^{1/} then entered pleas of not guilty to the charges against them. [Arr. tr. 1-2.]

Appellant was thereafter required to appear before the Court on June 11, June 18 and June 25, on each occasion for the ascertainment of counsel. Although he did appear, still without counsel, on June 11 and June 18, he failed to appear on June 25. In consequence, his bail was declared forfeited and on June 30 he was imprisoned pending trial. Three weeks later, on July 19, counsel was appointed to represent him.

1/ References to the arraignment transcript are cited as "Arr. tr." and to the trial transcript as "Tr."

Appellant's trial was scheduled for the week of August 18. On August 11, he obtained a continuance to the week of September 20 because his attorney's father had died in Ohio. On August 27, counsel moved that bail be reinstated on the ground that appellant's default on June 25 was caused by his bondsman's failure to notify him to appear. The District Court granted the motion. Four days later bail was reduced, and on September 2 appellant was able to regain his liberty. He was not tried during the week of September 20. On September 30 the trial date was continued until October 4 at the request of the attorneys for both defendants.

2. The Trial. The complaining witness testified that at approximately 8 p.m. on February 24, 1965, two men took from him at gunpoint several bottles of whiskey, some cans of malt liquor, a quantity of cigarettes and some thirty dollars in cash. The incident occurred in the lobby of an apartment building where he had gone to make a delivery for the liquor store for which he worked. [Tr. 5-11.] He identified appellant as the man who held the gun but was unable to identify the second man involved [Tr. 9-11, 25].^{2/}

Another Government witness testified that at approximately the same time and place, he saw two men whom he could not identify run with a box to a parked car, that a third man was in the car "closer to the driver's seat," that the car "took off immediately," and that he notified the police and described the car to them [Tr. 28-35].

2/ The Government also placed in evidence a certificate from the Metropolitan Police Department that on February 24, 1965, appellant had no license to carry a pistol in the District of Columbia [Tr. 3-4].

Two hours later a car fitting that description was stopped by the police in a different part of the city. Logan, who was buying the car from someone in Quantico, Virginia [Tr. 69], was driving. A man named Slim, appellant, his wife and two children were also in the car. Appellant and his family were riding in the rear seat. Slim fled the scene; insofar as the record shows, he has not been taken into custody. [Tr. 38-39.] The officer who stopped the car testified that he removed a pistol from under the right front seat and that when the locked trunk was opened immediately thereafter, he saw some of the stolen merchandise in it; appellant and Logan were arrested. [Tr. 39-44.]^{3/} Several days later, pursuant to a search warrant, the stolen property was seized by the police from the trunk of the vehicle [Tr. 57-58]. The pistol taken from the car was identified by the complaining witness as the weapon used in the robbery [Tr. 13-14]. It belonged to Logan [Tr. 67].

Appellant's wife testified that appellant had been with her at her sister's house from approximately 7 p.m. until 10 p.m. on February 24, when Logan at appellant's request came to carry appellant and his family home, and that they were riding home in Logan's car when the police stopped them [Tr. 86-87]. Appellant, after some vacillation [Tr. 66, 71, 73-75], decided not to testify. Logan

3/ The officer testified that he had seen Logan put "something" under the seat while Logan's car and the officer's were moving through an intersection prior to the time Logan was accosted [Tr. 40]. He also testified that Logan himself opened the trunk of the car for the officer's inspection [Tr. 41]. Logan testified that the pistol was found in the glove compartment and that when requested to do so by the officer, he handed over the key to the trunk and the officer opened it [Tr. 111]. The record suggests but does not establish that arrest followed search of the car [Tr. 41]. In any event, no motion to suppress the evidence so discovered was made in the District Court.

then took the stand. His testimony was the only evidence presented in his defense and is set out in detail at pp. 10-11, infra. He corroborated appellant's alibi. He also testified at length as to his own movements and those of his car during the evening in question. This testimony was immaterial to appellant's case. It was also wholly improbable and discredited by the jury. When Logan was through, appellant concluded to take the stand and testified to substantially the same facts as did his wife. The Government introduced in evidence upon cross examination appellant's conviction for robbery in 1957 [Tr. 154].

With respect to the first count of the indictment, the Court instructed the jury at the request of the Government [Tr. 164] that they might infer the guilt of either defendant or of both from his or their knowing possession of the recently stolen property if such possession was not explained to the jury's satisfaction [Tr. 196]. No objection was made on appellant's behalf to the instruction. The Court gave no specific instruction on the issue of identity nor did counsel for appellant request one.^{4/} No motion was made at or prior to trial either challenging the first count of the indictment for failure to charge an offense or to sever the trial of appellant from that of Logan.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The relevant constitutional provisions, statutes and rules are set forth in an Appendix.

4/ Counsel for Logan, however, did state that he would "rely on the Court to instruct the jury as to identification and so forth." The Court made no answer. [Tr. 164.]

STATEMENT OF POINTS

1. Appellant was seriously prejudiced and his substantial rights were affected as a result of his joinder for trial with Abraham Logan, Jr.
2. The District Court's instruction on recently stolen property misleadingly and confusingly charged the jury that appellant's guilt could be inferred from the fact that appellant was in Logan's car at the time of arrest.
3. The first count of the indictment did not allege that appellant intended wrongfully to deprive any person of his property and therefore did not charge the crime of robbery for which appellant was tried and convicted.
4. Appellant was deprived of his Sixth Amendment right to the assistance of counsel at his arraignment and for 52 days thereafter and was prejudiced thereby.

SUMMARY OF ARGUMENT

I. Fed. Rule Crim. P. 14 calls for a severance of defendants for trial whenever prejudice appears. Appellant was so prejudiced but no severance was ordered. The crucial issue for appellant was whether the jury would believe him and his wife or the complaining witness. Its resolution was improperly influenced by testimony given by Logan in his own behalf, testimony which was immaterial to the case against appellant and of sufficient improbability to destroy Logan's credibility, to weaken seriously that of appellant and appellant's wife and to strengthen that of the complaining witness. The nature of Logan's testimony also compelled appellant to testify in his own defense although he had ample reason, a prior robbery conviction, not to do so. Cross v. United States, 118 U.S. App. D.C. 324, 335 F.2d 987 (1964).

II. The only evidence of appellant's possession of recently stolen property, apart from evidence independently tending to show guilt, was his presence as a passenger in Logan's car at the time of arrest. The District Court's instruction on recently stolen property permitted the jury to infer appellant's guilt from this evidence alone. It therefore misled and confused the jury with respect to the first count of the indictment. It also improperly served to corroborate the critical identification testimony of the complaining witness. The error thus invalidates the conviction of appellant upon all three counts. People v. Evans, 24 Ill. 2d 11, 179 N.E. 2d 657 (1962); People v. Barnes, 311 Ill. 559, 143 N.E. 445 (1924).

III. Specific intent wrongfully to deprive another of his property is an essential element of the crime of robbery and must be alleged by the Government. The first count of the indictment, framed in the words of the statute, omitted any reference to intent. It is, therefore, fatally defective. United States v. Carl, 105 U.S. 611 (1881); Jackson v. United States, _____ U.S. App. D.C. _____, 348 F.2d 772 (1965).

IV. Had the District Court appointed counsel to represent appellant at arraignment as required by the Sixth Amendment, appellant's bail in all likelihood would not have been revoked and he would not have been incarcerated for two of the three months immediately preceding trial. His imprisonment pending trial was in itself prejudicial; he was deprived of the opportunity to search for a missing witness and his inability to consult closely with counsel may well have weakened his defense. Since this prejudice is fairly attributable to the denial of appellant's constitutional right to the assistance of counsel,

his convictions cannot stand. McGill v. United States, ___ U.S. App. D.C. ___, 348 F.2d 791 (1965); Anderson v. United States, ___ U.S. App. D.C. ___, 352 F.2d 945 (1965)

ARGUMENT

I.

Appellant Was Seriously Prejudiced and His Substantial Rights Were Affected by the District Court's Failure to Sever His Trial From That of Abraham Logan, Jr.

With respect to this point, appellant desires the Court to read the following pages of the trial transcript: Tr. 5-14, 28-35, 38-44, 58, 67, 86-87 and 105-136.

Fed. Rule Crim. P. 14 provides in part:

"If it appears that a defendant . . . is prejudiced by a joinder . . . of defendants . . . for trial together, the court may . . . grant a severance of defendants or provide whatever other relief justice requires."

Although no motion to sever was made on behalf of appellant at any time prior to or during trial, the prejudice which appellant suffered from the joint trial was serious and affected his substantial rights; the District Court's failure to sever constituted plain error cognizable by this Court under Fed. Rule Crim. P. 52(b). A review upon the merits of this argument is therefore appropriate.

See Gray v. United States, ___ U.S. App. D.C. ___, ___ F.2d ___, January 6, 1966, slip op. at p. 2; Monroe v. United States, 98 U.S. App. D.C. 228, 236, 234 F.2d 49, 57-58 (1956), cert. den., 352 U.S. 873.

5/ The District Court was, of course, under "a continuing duty at all stages of the trial to grant a severance if prejudice" appeared. Schaffer v. United States, 362 U.S. 511, 516 (1960); United States v. Kelly, 349 F.2d 720, 759 (2d Cir. 1965), and was empowered to do so on its own initiative as well as in response to an appropriate motion. Cupo v. United States, ___ U.S. App. D.C. ___, ___ F.2d ___, March 21, 1966, slip op. at p. 7; Gajewski v. United States, 321 F.2d 261, 266 (8th Cir. 1963), cert. den., 375 U.S. 968.

The prejudice to which the joint trial subjected appellant developed when Logan took the stand in his own behalf and gave testimony almost all of which was wholly immaterial to the Government's case against appellant or to appellant's defense. This testimony was for the most part highly improbable--indeed, Logan's conviction establishes that the jury did not believe him--but it corroborated appellant's alibi defense in two particulars that were not unlikely at all. The implausibility of by far the major portion of Logan's story, heard by appellant's jury only because the two were jointly tried, discredited that corroboration, thereby undermining the credibility of appellant and his wife and strengthening the credibility of the complaining witness. In addition, Logan's election to take the stand and the nature of his testimony compelled appellant also to testify although against the advice of counsel and despite a prior robbery conviction that was used to impeach him.

The Government's case against appellant consisted of the complaining witness' identification and the circumstance that when arrested he was riding in the back seat of the apparent getaway car in which were found the gun the complaining witness said had been used in the crime and, in the locked trunk, some of the stolen property. Appellant's defense, prior to Logan's testimony, consisted of his wife's evidence that he had been with her at her sister's home the entire evening until, after appellant had contacted him by telephone, Logan came in his car at about 10 p.m. to take appellant and his family home. After Logan testified, appellant took the stand and gave testimony substantially the same as that of his wife. Appellant's case depended upon whether the jury believed him and his wife or the complaining witness.

The Government's case against Logan consisted of the circumstance that upon his arrest he was driving the apparent getaway car and had in his possession the key to its trunk, where the stolen property was found. Also, the gun found in the car was his. Logan's defense consisted of his own testimony. He said [Tr. 105-136]:

At 7 p.m. on the evening of the robbery he had parked his car near a "club" at 9th and G Streets. He did not return to the car until approximately 9:50 p.m. At 8:45 p.m., he entered the club after leaving a nearby poolroom, where he had been playing pool, and was called to the telephone by Slim, whom he knew. The call was from appellant, who asked Logan to pick up appellant and his family at appellant's sister-in-law's house and drive them home because ^{6/} appellant didn't have enough money for cab fare. As Logan was preparing to leave the club, he was approached by Slim, who asked whether Logan was going to pick up appellant. Logan said yes. Slim suggested that he ride along. Logan agreed. Slim then walked to the car while Logan went into the poolroom to say that he wouldn't be playing any more. Slim was sitting in the car when Logan came out. Logan noticed that the car was two car-lengths away from where he had parked it earlier in the evening. Upon starting the car, Logan experienced some

6/ Since appellant testified that he had most of his week's salary in his pocket [Tr. 145], the truthfulness of Logan's statement that appellant had told him that he had insufficient money to take a taxi home was of some significance. [See Tr. 121.] But appellant could hardly have tried vigorously to impeach Logan on this point. To discredit him concerning what appellant said when they spoke on the telephone could all too easily impeach his corroborative testimony that appellant made the call in the first place. See United States v. Franklin, 235 F. Supp. 338, 341 (D.D.C. 1964). Here, too, the joint trial bred prejudice.

difficulty with the lights. He drove with Slim from 9th and G Streets to 2608 Tenth Street, N.E., where Logan lived. During the ride, Slim gave him a carton of cigarettes and a fifth of whiskey, which Slim had in his hands, because, as Slim said, Logan had "been so nice to" him. Logan took the cigarettes but not the liquor. Slim said that what he had given Logan had been left over from a party.

Logan drove to his home in order to pick up his special policeman's uniform, his fully loaded gun and his handcuffs, all of which he needed for the special policeman's job he had at 10 a.m. the following morning at the Dunbar Hotel. He planned to spend the night at his brother's house in southeast Washington and decided to take his uniform and equipment there. When Logan returned from his home to the car, it was about 25 to 30 feet from where, running and in neutral, he had left it. The motor was off and the car was in the parking gear. He and Slim then proceeded to appellant's sister-in-law's home where they picked up appellant, his wife and children. This was the first time that appellant had been with Logan that evening. The entire group was heading toward appellant's home when Logan began having trouble with his horn, trouble which he hadn't had before. When he stopped the car to get aspirin for appellant's baby, he looked under the hood to see what was causing the horn to misbehave; however, it was too dark to see anything. He noticed that wires had been torn from under the dashboard and that some of them had been taped together. At this point a police car pulled up and the arrest was made. Logan had no idea how the stolen property got into the locked trunk.

As noted, Logan did corroborate the evidence given by appellant's wife

that appellant had called Logan to ask him to drive appellant and his family home and that Logan's arrival to do so at about 10 p.m. marked the first time that appellant and Logan had been together that evening. But the portion of Logan's testimony immaterial to appellant, which dwarfed his corroboration of appellant's alibi, was so replete with improbabilities as to shatter any belief in what he said. The jury was asked to believe--and, predictably, did not--the mysterious movement of Logan's car between the time he parked it at 7 p.m. and the time he re-entered it later in the evening; Slim's desire to ride along with Logan to appellant's sister-in-law's house; Slim's generosity toward Logan because of the latter's pleasing personality; Logan's difficulty with the car's lights and horn; his trip home to pick up his uniform and fully loaded pistol; the second movement of the car while Logan was inside his home and Slim was in the car; and, lastly, the torn wires from under the car's dashboard.

The prosecuting attorney did not let these improbabilities go unnoticed. [Tr. 179-182.] The jury, he said, would be "stupid" to believe Logan, who was attempting to "ram" non-existent third parties "down your throat," who "conjures" people up, and who must think the jury sufficiently "foolish" to "swallow" a story that robbers took his car only to bring it back still containing the stolen goods. Logan's was "a weird story about his car moving about" which could "be characterized by one word, hogwash." Indeed, in the heat of his attack upon Logan's credibility, the prosecuting attorney omitted to exercise that "vigilant precision in speech and action far beyond that required in the ordinary trial." Drew v. United States, 118 U.S. App. D.C. 11, 20, 331 F.2d 85,

94 (1964). He tainted appellant with Logan's incredibility by unwittingly but nonetheless prejudicially telling the jury that appellant "had this individual Logan go over to a poolroom and then cut to his [Logan's] home and out to the northeast." [Tr. 183.] Appellant, however, asked Logan to go nowhere but to his sister-in-law's home.

The prejudice suffered by appellant as a result of Logan's self-defeating testimony was no different than that incurred by the appellant Jackson in Cross v. United States, 118 U.S. App. D.C. 324, 335 F.2d 987 (1964). There, the joinder for trial of two counts of an indictment returned against Cross and Jackson was held to have prejudiced Cross by compelling him to take the stand in his own defense upon both charges although he "had ample reason not to testify" as to one of them. The joinder was also held to have prejudiced Jackson. Referring to the count upon which Cross had given "plainly evasive and unconvincing" testimony that he was drunk and ignorant of his whereabouts at the time of the crime, this Court said:

"If that count had been severed for trial, the jury would not have heard Cross' self-defeating testimony. It might therefore have given greater credence to Jackson's strong alibi defense. 14/ Cross' testimony was offered as a result of the trial court's error in refusing his request for severance of the offenses. Thus the prejudice to Jackson must be deemed to have resulted from the same error.

"14/ The same two witnesses gave the same testimony constituting the substance of the Government's case against both appellants. The witnesses were admitted accomplices in the alleged crime; one, and perhaps both, admitted prior convictions. Their credibility was a major issue. To the extent that Cross' testimony lacked credibility, their credibility was strengthened."

118 U.S. App. D.C. at 328, 335 F.2d at 991.

The differences between Jackson's situation and appellant's are not such as to call for disparate appellate results. Appellant's jury heard Logan's unconvincing testimony as a result of a joinder of defendants for trial. Jackson's jury heard Gross' unconvincing testimony because of a joinder of counts (and defendants) for trial. Rule 14, of course, calls for severance of either counts or defendants whenever prejudice occurs. Jackson's jury could have believed his alibi defense or the testimony of the two Government witnesses, who were accomplices in the alleged crime and had prior convictions. Appellant's jury could have believed appellant's alibi defense or the one Government witness, who was not an accomplice with a prior conviction but who may have been biased [Tr. 79, 155-156]. In any event, the credibility of the complaining witness was "a major issue" here as in Grose. Indeed, it was the heart of appellant's defense. Gross' unconvincing testimony led the jury to discredit him and thus to strengthen the credibility of the Government witnesses not only with respect to their testimony implicating him but also with respect to their evidence against Jackson. Logan's unconvincing testimony led the jury to discredit him not only with respect to his own defense but also with respect to his corroboration of appellant's defense. Had Logan's corroborating testimony not been thusly discredited, the jury might have given greater credence to appellant and his wife and less credence to the complaining witness.

Cross is also applicable to the instant case in a different way. Cross' conviction--as opposed to Jackson's--was reversed because the joinder of counts compelled him to testify with respect to the count upon which he may have wished to remain silent. Therefore the joinder was held prejudicial under Rule 14.

Here, appellant indicated to his attorney just prior to the close of the Government's case that he wanted to testify in his own defense although his attorney had advised him to the contrary [Tr. 66]; appellant had been convicted upon a robbery charge eight years earlier. After the Government rested, the District Court advised appellant of his right to take the stand. [Tr. 71.] Following further conversation both with the Court and with counsel, appellant, obviously unsure of himself, declared that he would not testify, then reconsidered and reserved his decision until later in the trial. [Tr. 73-75.] Appellant's wife testified. When she stepped down, appellant's counsel advised the Court that appellant did not then intend to take the stand. [Tr. 103.] Counsel for Logan proceeded with his case, which consisted of Logan's testimony summarized above. When Logan was finished, appellant again expressed a desire to take the stand. The Court permitted consultation between appellant and his counsel. [Tr. 137-138.] Appellant then testified. His testimony was substantially like that of his wife's. His prior conviction was introduced into evidence for purposes of impeachment. [Tr. 154.]

Appellant took the stand against the advice of counsel. The record does not indicate why he elected to testify, but his choice was plainly influenced by Logan's testimony. ^{7/} He well may have thought it imperative to appear before

7/ The vehemence of counsel's advice to appellant that he not testify may well have been tempered by apprehension as to what argument would be made to the jury on Logan's behalf. There was no evidence in the record that would have precluded Logan's attorney from arguing that appellant could have been responsible for the first mysterious movement of Logan's car and the stolen property in its trunk. Appellant had been identified by the eye witness, not Logan. Logan's gun had been identified, but not persuasively. Had this

the jury to counteract with his own straightforward testimony the jury's general disbelief in Logan and the attendant discrediting of Logan's corroborative testimony. Moreover, appellant may have been worried about the jury's reaction to his failure to testify when Logan was willing to do so; if Logan took the stand despite the strangeness of his story, would not the jury conclude that appellant's silence concealed something even more discrediting? Yet the destructive improbabilities of Logan's testimony, as to which appellant had good reason to concern himself, were immaterial to appellant's case and would not have reached the jury but for the joint trial. Hence, appellant's election to take the stand in his own defense was heavily influenced by his joinder with Logan, and the joinder was thus as prejudicial to him as the joinder of counts was to Cross.

In short, for the several reasons noted above Cross requires that
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7/ (continued)

argument been made, Logan's attorney might well have invoked Logan's willingness to take the stand in contrast to appellant's silence. Compare De Luna v. United States, 308 F.2d 140 (5th Cir. 1962) rehearing denied, 324 F.2d 375 (1963) with Hayes v. United States, 329 F.2d 209, 221-22 (8th Cir. 1964), cert. den., 377 U.S. 977. This in itself might have sufficed to require a severance. Compare De Luna v. United States, supra, with United States v. Parness, 331 F.2d 703 (3d Cir. 1964), cert. den., 377 U.S. 993. That it may have had an effect upon appellant's election to take the stand is, therefore, of some significance in determining whether appellant's decision was influenced, improperly, by the joinder of defendants for trial.

8/ There was here an aspect of prejudice in addition to those present in Cross. In Salley v. United States, ____ U.S. App. D.C. ___, 353 F.2d 897 (November 24, 1965) this Court held that the District Court must give a specific

injury to the Government resulting from expensive and time-consuming repetitive trials is or was present. United States v. Verra, 203 F. Supp. 87, 90-91 (S.D.N.Y. 1962); United States v. Nomura Trading Co., 213 F. Supp. 704, 707 (S.D.N.Y. 1963).

II.

The District Court's Instruction As to Possession
of Recently Stolen Property Misled and Confused
the Jury.

With respect to this point, appellant desires the Court to read the pages of the trial transcript listed under Point I, supra.

Pursuant to the Government's request [Tr. 164] the District Court instructed the jury as follows:

Now, there is a further principle of law in connection with count one of the indictment, and that is the principle known as possession of recently stolen goods, and in that

8/ (continued)

instruction on a defense of mistaken identity whenever one is requested. Logan's attorney appears to have made such a request ("I will rely on the court to instruct the jury as to identification" [Tr. 164]); counsel for appellant did not. But the identification in issue was that of appellant, not Logan, so that the general request for the identity instruction must have been taken by appellant's counsel as applicable to appellant as well as to Logan. This would account for the fact that no separate request was made on appellant's behalf. The joinder of appellant and Logan for trial led to this misunderstanding. Had there been separate trials an instruction on identity would in all probability have been requested by appellant and given by the Court. At least the confusion generated by the joint trial would not have inhibited the request. Hence, unless appellant is deemed to have shared in Logan's request--in which case the failure to give an identity instruction was, under Salley, reversible error--the joint trial must be held to have prejudiced appellant in this respect as well as in the others previously mentioned.

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regard you are instructed that if you find that a defendant knowingly had in his possession any of the property recently taken from the complaining witness, and there has been a failure to explain such possession to your satisfaction, then you, the members of the jury, may infer therefrom the guilt of such defendant or defendants of the charge.

If, however, even if you find the defendant or defendants was or were in possession of property recently stolen but you find that the explanation of such possession satisfies you, then, of course, you would not so infer.

[Tr. 196.]

No objection to the instruction was made on appellant's behalf. Even so, as we shall show, the instruction constituted plain error under Rule 52(b); it charged no less than that the jury could infer appellant's guilt from his presence in Logan's car.

Aside from the identification made by the complaining witness, the Government's evidence showed only that at the time of his arrest appellant was riding with his wife and children in the back seat of the getaway car, which was Logan's, and that the stolen property was in the car's locked trunk. There was no testimony that appellant had a key to the trunk. Such evidence, standing alone, is, of course, insufficient to permit the jury to find that appellant was in possession of the stolen property. People v. Evans, 24 Ill. 2d 11, 179 N.E. 2d 657 (1962). To permit an inference of guilt, an accused's possession must be "exclusive." Tractenberg v. United States, 53 App. D.C. 396, 398, 293 Fed. 476, 478 (1923). This connotes "a distinct and conscious assertion" of "personal" possession. Butz v. State, 221 Md. 68, 78, 156 A.2d 423, 428 (1959). "It would be pushing the rule too far to require of one accused of a crime an explanation of his possession . . . , when such possession could also with equal

right, be attributed to another." State v. Boudreau, 111 Vt. 351, 361-62, 16 A.2d 262, 266 (1940).

To be sure, exclusive possession can be exercised jointly, in which case an inference of guilt may be drawn against any of the possessors standing trial. To establish such joint possession, however, there must be evidence that the accused was acting in concert with the person under whose actual control and possession the stolen property was found. Weisman v. United States, 1 F.2d 696, 698-99 (8th Cir. 1924); People v. Henkel, 60 Ill. App.2d 331, 337, 208 N.E.2d 107, 109 (1965).

Here, the only evidence that appellant was engaged in concerted activity with Logan was the identification testimony of the complaining witness together with the inference arising from Logan's possession of recently stolen property in the locked trunk of his car. Yet the instruction given by the District Court could hardly have been based upon the supposition that the identification testimony sufficed to permit the jury to conclude that appellant was in joint possession of the stolen property. Such an analysis renders the instruction ludicrous; the jury assuredly was not charged that if they believed the complaining witness and, hence, appellant's guilt, they could find that he was in joint possession with Logan of the stolen property and from such possession could infer what they had already determined, namely, appellant's guilt. No court would give such a tautological instruction and no jury would comprehend it.

In sum, the instruction given by the District Court must have been understood by the jury as charging that appellant's guilt could be inferred from his presence in Logan's car at the time of his arrest. This, quite clearly, was

impermissible. People v. Barnes, 311 Ill. 559, 563, 143 N.E. 445, 447 (1924). Appellant's entire defense rested upon the hope that the jury would believe his alibi defense and discredit the complaining witness. But the Court's instruction allowed the jury to convict even though they rejected the identification testimony. As in Smith v. United States, ____ U.S. App. D.C. ____, ____ F.2d ____, March 9, 1966, slip op. at p. 3, it was "entirely possible that the inference permitted the jury from possession was a very important element in the verdict of guilty." Here, that inference was improperly permitted.

The error contained in the instruction invalidates not only appellant's conviction of robbery, but also his conviction upon the other counts of the indictment. The inference of guilt which was wrongly permitted corroborated the testimony of the complaining witness and may well have persuaded the jury to credit his evidence although they otherwise would not have. And if this corroboration established the reliability of his identification for purposes of the robbery count, it must have had a similar effect on the same identification for purposes of the other counts.

III.

The First Count of the Indictment Does Not Charge the Crime of Robbery.

Under the first count of the indictment appellant was charged with, and convicted of, robbery, 22 D.C. Code § 2901. The statute provides:

"Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years."

This provision defines robbery "in the usual common law sense of the term except as expanded." Neufield v. United States, 73 U.S. App. D.C. 174, 118 F.2d 375 (1951), cert. den. sub. nom., Ruben v. United States, 315 U.S. 798; United States v. Mann, 119 F. Supp. 406, 407 (D.D.C. 1954). Robbery is a "species of aggravated larceny," Lamore v. United States, 78 U.S. App. D.C. 12, 136 F.2d 766 (1942); United States v. Mann, supra, and larceny is necessarily included in the offense of robbery. Lamore v. United States, supra. An essential element of the crime of larceny, hence of the crime of robbery, both at common law and under the statute, is the specific intent wrongfully to deprive the owner of possession of his property. "Stealing, Larceny, and its variants and equivalents, were among the earliest offenses known to the law that existed before legislation State courts of last resort . . . have consistently retained the requirement of intent in larceny-type offenses." Morissette v. United States, 342 U.S. 246, 260-61 (1952). See, United States v. Nedley, 255 F.2d 350, 351 (3d Cir. 1958); Hunt v. United States, 115 U.S. App. D.C. 1, 316 F.2d 652 (1963); Mills v. United States, 97 U.S. App. D.C. 131, 228 F.2d 645 (1955).

The first count of the indictment in this case charges:

On or about February 24, 1965, within the District of Columbia, Leroy M. Gray and Abraham Logan, Jr., by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting in fear, stole and took from the person and from the immediate actual possession of Bernard Stevenson, property of Jewler's Market & Liquors, Inc., a body corporate, of the value of about \$78.70, consisting of the following: one bottle of beer of the value of \$1.00, three bottles of scotch of the value of \$5.00 each, \$54.70 in money and four cartons of cigarettes of the value of \$2.00 each.

Except for the word "stole," the indictment in relevant respects tracks the language of the statute. It wholly fails to charge appellant with the specific intent to deprive another of his property. It is, therefore, fatally defective. An indictment must "fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." United States v. Carll, 105 U.S. 611 (1881). Although framed in the terms of the statute, an indictment is insufficient where the statute itself does not specify every element of the crime. United States v. Carll, supra; Evans v. United States, 153 U.S. 584, 587 (1894); Moens v. United States, 50 App. D.C. 15, 267 Fed. 317 (1920); Cornelas v. United States, 236 F.2d 392 (9th Cir. 1956). This rule has been applied repeatedly where an indictment, as here, fails to charge a defendant with the intent or knowledge essential to commission of the crime. Moens v. United States, supra; Robinson v. United States, 263 F.2d 911 (10th Cir. 1959); Carlson v. United States, 296 F.2d 909 (9th Cir. 9/
1961).

Just a week after appellant was arraigned upon this faulty first count, a substantially identical robbery indictment was said by this Court in Jackson v. United States, ___ U.S. App. D.C. ___, 348 F.2d 772, 774 (1965) to

" . . . leave[s] much to be desired both in completeness and in clarity. The element of specific intent should be clearly stated. Furthermore the indictment should state the offense charged more precisely, rather than set forth

9/ The inadequacy of the instant indictment was not attacked at the trial court level. Even so, the fatal defect from which it suffers may be raised at any stage of a criminal proceeding. Robinson v. United States, supra; Carlson v. United States, supra at p. 910; United States v. Amorosa, 167 F.2d 596, 598 (3d Cir. 1948). Cf. Fed. Rules Crim. P. 12(b)(2), 34 and 52(b).

the omnibus statutory provision under which the accused is charged." 10/

Appellant, however, was not reindicted. Instead, the Government proceeded to trial on the defective indictment. Appellant's conviction for robbery must therefore be reversed and the first count of the indictment dismissed.

IV.

Appellant Was Deprived of His Right to the Effective Assistance of Counsel by the Failure of the District Court to Appoint an Attorney to Represent Him at His Arraignment or For 52 Days Thereafter.

With respect to this point, appellant desires the Court to read the two-page arraignment transcript.

This Court has of late ruled that although an accused has a constitutional right under the Sixth Amendment to be represented by an attorney from the time of his arraignment, his appearance to plead unrepresented by counsel will not necessarily lead to reversal of a subsequent conviction. McGill v. United States, ____ U.S. App. D.C. ____, 348 F.2d 791 (1965); Anderson v. United States, ____ U.S. App. D.C. ____, 352 F.2d 945 (October 28, 1965); Barnett v. United States, ____ U.S. App. D.C. ____, ____ F.2d ____ (December 13, 1965). The absence of counsel must have "at least exposed" an appellant "to a reasonable possibility of prejudice in fact." McGill v. United States, supra, at p. 793. Or, put another way, the record must afford this Court a basis "'for an informed speculation' that appellant's rights were prejudicially affected." Anderson v. United

10/ Jackson's conviction was reversed on other grounds; the District Court's instruction upon specific intent misinformed the jury. Here, the jury was instructed, simply and without elaboration, that an essential element of the crime of robbery is the defendant's "intent to convert [what he had taken] permanently to his own purpose" and that the Government had to prove beyond a reasonable doubt this as well as the other elements of the crime. [Tr. 193, 194.]

States, supra, at p. 947. These standards comport, in this Court's view, with Hamilton v. Alabama, 368 U.S. 52 (1961) and White v. Maryland, 373 U.S. 59, 60 ^{11/} (1963). They are met and require reversal in the instant case.

The facts concerning appellant's lack of counsel are set out at pp. 2 - 3, supra. They demonstrate at the least that had an attorney been appointed to represent appellant at his arraignment, there would have been no need for subsequent appearances to ascertain the identity of counsel and, in consequence, appellant's bail would not have been forfeited for failure to appear on June 25. Even if for some other reason appellant might have been required to appear in court on that day or any other, the chances that he would have failed to appear because of insufficient notice would have been substantially lessened if at the time he had had the benefit of counsel who undoubtedly would have exerted some effort to insure that appellant was properly notified and cautioned to attend. Even assuming further that the presence of counsel would not have prevented appellant's default, the attorney would surely have acted promptly to obtain reinstatement of bail. As it was, however, appellant had no attorney for three weeks after he had been jailed, and bail was not reinstated on counsel's motion until appellant had spent two months (two of the three months immediately preceding trial) in prison. In short, there was assuredly a reasonable probability that had appellant not been deprived of his constitutional right to counsel, he would not have been jailed pending trial. He certainly would not have been jailed for

^{11/} If this Court concludes otherwise, we urge that it reconsider its reading of Hamilton and White, which, we believe, call for reversal where an accused is arraigned without counsel regardless of whether or not prejudice thereby is engendered. See Pointer v. Texas, 380 U.S. 400, 402 (1965).

two months pending trial.

Appellant's loss of liberty in itself was prejudicial. This Court said as much in Ricks v. United States, 118 U.S. App. D.C. 216, n.2 at pp. 218-219, 334 F.2d 964, n.2 at pp. 966-67 (1964), construing Wood v. United States, 75 U.S. App. D.C. 274, 128 F.2d 265 (1942). See also Dancey v. United States, ____ U.S. App. D.C. ____, ____ F.2d ____, October 14, 1965, modified February 11, 1966, slip op. at p. 3 n.2. The same general conclusion is suggested in A Study of the Administration of Bail in New York City, 106 U.Pa.L.Rev. 693, 725-27 (1958); Compelling Appearance in Court: Administration of Bail in Philadelphia, 102 U. Pa. L. Rev. 1031, 1051-54 (1954); Rankin, The Effect of Pretrial Detention, 39 New York U. L. Rev. 641, 643 & n.6 (1964). The survey reported in the last-cited article, while insufficient to allow the author "confidently" to state the effect on conviction of detention before trial, indicates in a tabulation, set out at id. n.6, that appellant's incarceration in the instant case altered the Government's chances of conviction from 49 out of 100 to somewhere between 65 and 94 chances out of 100.

One aspect of the prejudice incurred by appellant because of his imprisonment can be pinpointed. Slim, upon whom Logan so ineffectually placed the onus of guilt, was never located. Had appellant been free during his period of pre-trial incarceration, he might have been able to find the missing witness. He was, of course, better suited for that task than was tardily appointed counsel. See A Study of the Administration of Bail in New York City, supra, at p. 725.

A less direct but nonetheless real prejudice is evidenced by appellant's present need to rely on the plain error doctrine. This reliance is, we

believe, well placed, so that counsel's failure to raise the issues involved at or prior to trial should not preclude relief upon appeal. But if this Court does not agree that these errors are plain, we submit that had appellant been free during the entire period between arraignment and trial, he would have been able more thoroughly to review his case with counsel, and in the course of such review counsel might well have developed defensive moves that in fact were never made, i.e., motions to dismiss the robbery count and to sever the defendants for trial. As noted in Glasser v. United States, 315 U.S. 60, 76 (1942), "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculation as to the amount of prejudice arising from its denial."

CONCLUSION

For the reasons stated above, the conviction of appellant upon all three counts of the indictment should be reversed and the first count of the indictment should be dismissed.

Respectfully submitted,

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734 Fifteenth Street, N.W.
Washington, D. C. 20005

Attorney for Appellant
(Appointed by this Court)

A P P E N D I X

Constitution of the United States

Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed , which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statutes

28 U.S.C. §1291:

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

22 D. C. Code §502:

Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years.

22 D. C. Code §2901:

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

22 D. C. Code §3204:

No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon

capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years.

Federal Rules of Criminal Procedure

Rule 12(b)(2):

Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

Rule 14:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

Rule 34:

The court shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 5 days after determination of guilt or within such further time as the court may fix during the 5-day period.

Rule 52(b):

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Certificate of Service

I hereby certify that the foregoing Brief has been served upon the United States of America by delivering a copy, this 8th day of April, 1966, to the United States Attorney at his office in the United States Court House, Washington, D. C.

Benjamin W. Boley

REPLY BRIEF FOR APPELLANT

In the
UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 6 1966

No. 19,915

Nathan J. Paulson
CLERK

LEROY M. GRAY,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District
Court for the District of Columbia

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Washington, D. C. 20005

Attorney for Appellant
(Appointed by this Court)

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For the most part the contentions made by the Government are met in appellant's opening brief. Nevertheless, short reply may serve more sharply to delineate the points in controversy.

1. Severance. The Government concedes that if appellant was in fact prejudiced by his joinder with Logan for trial, the District Court had a duty to grant severance and could have done so on its own initiative. Appellant's position is that he was in fact prejudiced by the testimony given by Logan and that the District Court plainly erred in failing, sua sponte, to perform its duty to order severance. There is, under such circumstances, no question of waiver or of appellant's failure to show potential prejudice. The only question is one of prejudice in fact and its impact on appellant's "substantial rights." Fed. Rule Crim P. 52(b).

The Government has not disputed appellant's assertion that Logan's testimony improperly served to discredit Gray and his wife and to strengthen the credibility of the complaining witness. Its position appears to be that this result was simply not prejudicial here, although it was in Cross v. United States, 118 U.S. App. D.C. 324, 335 F.2d 987 (1964). To be sure, the Government's witnesses in Cross were more vulnerable to attack on their credibility than the record shows was true of the complaining witness in this case. But the prejudice to the defendants in both cases was much the same. In each instance the crucial issue was whether the jury would believe the testimony of Government witnesses (one here, two in Cross) or the testimony of the defendant (and, here, of his wife as well). And in both instances the jury's resolution of this issue was improperly influenced by self-defeating, incredible, testimony given by a co-defendant. Appellant was entitled to place his credibility before the jury unentangled from that of Logan. Such, in this case, was a substantial right, and the joint trial effectually denied it.

The various cases cited by the Government in which severance has been denied in substantially different contexts are not at all controlling. Whatever prejudice may arise from hostile defenses of co-defendants can perhaps be minimized by vigorous cross-examination, and whatever prejudice may arise in cases where a co-defendant has a prior criminal record or has confessed may be lessened, or so it has been held, e.g., Delli Paoli v. United States, 352 U. S. 232 (1957), by appropriate instructions or, in the former situation, by application of Luck v. United States,

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— U. S. App. D.C. —, 348 F.2d 763 (1965). Neither recourse was open here. Appellant could hardly have sought to cross-examine Logan with any great vigor for fear of destroying his credibility entirely, see United States v. Franklin, 235 F.Supp. 338, 341 (D.D.C. 1964), and an instruction that the jury could believe parts of Logan's testimony and disbelieve others might have served only to underscore a general distrust of Logan. Contrary to the Government's view, appellant's trial counsel's reliance upon Logan's testimony in his closing argument did not show that he thought it was beneficial to Gray. It quite plainly was not. Trial counsel apparently chose one way out of a dilemma. His alternative was to suggest that Logan need be credited only in part. Neither approach could have eliminated the prejudice already suffered by appellant.

Lastly, the record shows that despite earlier vacillation in deciding whether or not to take the stand [Tr.66,71,73-75] appellant announced after his wife had testified that he did not intend to do so. After Logan testified, he again changed his mind and elected to speak. Under such circumstances, the compulsion to testify aspects of Cross and the principles enunciated in De Luna v. United States, 308 F.2d 140 (5th Cir. 1962) reh. den., 324 F.2d 375 (1953) are applicable.

2. Instruction on possession of recently stolen property.

The first two points made by the Government in answer to appellant's contention on this issue are essentially the same. If appellant is now barred under Fed. Rule Crim. P. 30 from claiming on appeal that the instruction confused and misled the jury, it is because the error was harmless rather than plain. If plain error was committed, however, Rule 30 does not pre-

clude reversal. See Singer v. United States, 380 U.S. 24,38 (1965).

Appellant has shown in his opening brief that the District Court's instruction permitted the jury to convict him even if they did not believe the complaining witness and, in addition, may well have caused the jury to give credence to the complaining witness who otherwise might have been disbelieved. In short, the error did affect appellant's substantial rights.

Parenthetically, Smith v. United States, ___ U.S. App. D.C. ___, 359 F. 2d 243 (1966), supports appellant, not the Government. There, this Court emphasized the importance an instruction on recent possession can have and, although no objection had been made in the District Court, reviewed to at least some extent on the merits the instruction there given. Moreover, Smith claimed not that the instruction was clearly confusing and misleading but that it was arguably incomplete; the Court had told the jurors that they "may infer" guilt while the appellant urged that they should have been advised that they were not required to do so.

The Government bases its contention that the instruction given by the District Court was correct upon the view that Gray and Logan jointly possessed the stolen property at the time of their arrest. Gray's involvement in this possession must, as the Government apparently realizes, depend upon the identification testimony of the complaining witness; absent such testimony, there was insufficient evidence of his possession. See Allison v. United States, 348 F.2d 152 (10th Cir.1965). Yet it is precisely because the identification testimony must be relied upon to establish Gray's possession that the Court's instruction was erroneous as to him. For implicit in the Government's argument is a

reading of the instruction as charging the jury, in effect, that if it believed appellant had committed the crime, it could find that he was in joint possession with Logan of the recently stolen property at the time of their arrest and from that finding infer what the jury had found at the outset, that appellant had committed the crime. Such an instruction could not fail to confuse and mislead a jury and did so here.

3. The indictment. The Government agrees, of course, that the first count of the indictment cannot support the conviction of appellant if it failed to allege a crime. Nor does the Government contest that the specific intent wrongly to deprive another of his property is an essential element of the crime of robbery purportedly alleged in the first count. Rather, the Government urges that by alleging that appellant "stole" the property in question, the indictment fully charged such specific intent.

The specific intent in question must be alleged "fully, directly, and expressly, without any uncertainty or ambiguity."

United States v. Carll, 105 U.S. 611 (1881). And, as statute and case law demonstrate, the word "steal" does not clearly incorporate the element of specific intent. Congress has in a variety of federal statutes defined as crimes "to steal" with the "intent to convert," or "to take" with the "intent to steal." See e.g., 18 U.S.C. §659; 18 U.S.C. §661; 18 U.S.C. §2113 (b). Similarly, countless federal and state cases refer to the "intent to steal" as an ingredient of larceny-type crimes. See, e.g., Mills v. United States 97 U.S. App. D.C. 131, 228 F.2d 645 (1955); People v. Baker, 365 Ill. 328, 6 N.E. 2d 665 (1937). These references would be redundant and improper

if the word "steal" were given the meaning the Government would require this Court to place upon it.

In any event, the issue was resolved adversely to the Government's position in Morissette, v. United States, 342 U.S. 246 (1952). Morissette was charged and convicted under 18 U.S.C. §641, providing that "whoever embezzles, steals, purloins or knowingly converts" government property is punishable by fine and imprisonment. The trial judge had charged the jury that specific intent was not an element of the statutory crime. The Government in support of the conviction urged that Congress had incorporated in the section a crime of which specific intent was not an element. The Court concluded otherwise. And it remarked that the United States when drafting the indictment also must have viewed the statute differently. For to the statutory language the Government had added in the indictment words importing intent -- "unlawfully and willfully" -- so the indictment charged that defendant "did unlawfully, willfully and knowingly steal and convert to his own use." (Emphasis added). By way of explanation the Court added:

Had the indictment been limited to a charge in the words of the statute, it would have been defective if, in the light of the common law, the statute itself failed to set forth expressly, fully and clearly all elements necessary to constitute the offense. 342 U.S. at p. 270 n. 30

Clearly, if the word "steal" was insufficient to charge the element of intent in the indictment underlying Morissette's conviction, it is no more effective in the indictment here.

This Court in Jackson v. United States, ___ U. S. App. D.C. ___, 359 F.2d 260 (1966), relied upon by the Government, did approve an indictment similar to the first count of the indictment against appellant. However, the absence of an allegation of specific intent was not challenged in that case nor was the issue considered by the Court. The Government also relies upon appellant's failure to object to the indictment in the District Court; this overlooks those cases that permit the error here complained of to be raised for the first time upon appeal. E.g., Carlson v. United States, 296 F.2d 909, 910 (9th Cir. 1961); Robinson v. United States, 263 F.2d 911 (10th Cir. 1959); United States v. Amorosa, 167 F.2d 596, 598 (3d Cir. 1948).

4. Lack of counsel. The Government has urged with respect to every contention made by appellant, including this one, that because no plain error is involved the failure of appellant to make timely objection in the District Court precludes him from raising in this Court the issues he seeks to raise. On the other hand, the Government insists that the appellant's lack of counsel at his arraignment and for 52 days thereafter does not provide the basis even for an "informed speculation" that he might have thereby been prejudiced. Appellant of necessity relies on the plain error doctrine and believes it clearly applicable. There is surely some probability, however, that had appellant not been subjected to the denial of his Sixth Amendment right some of the arguments here made would have been developed and presented in the District Court, and appellant would not now be thrown back on Rule 52 (b). The development of legal

arguments by court-appointed counsel may and are induced and assisted by frequent consultation with a defendant. In this case such consultation was in effect precluded during the two-month period of appellant's incarceration upon the revocation of bail in the absence of legal representation. Appellant had but one month of liberty to assist counsel prior to trial.

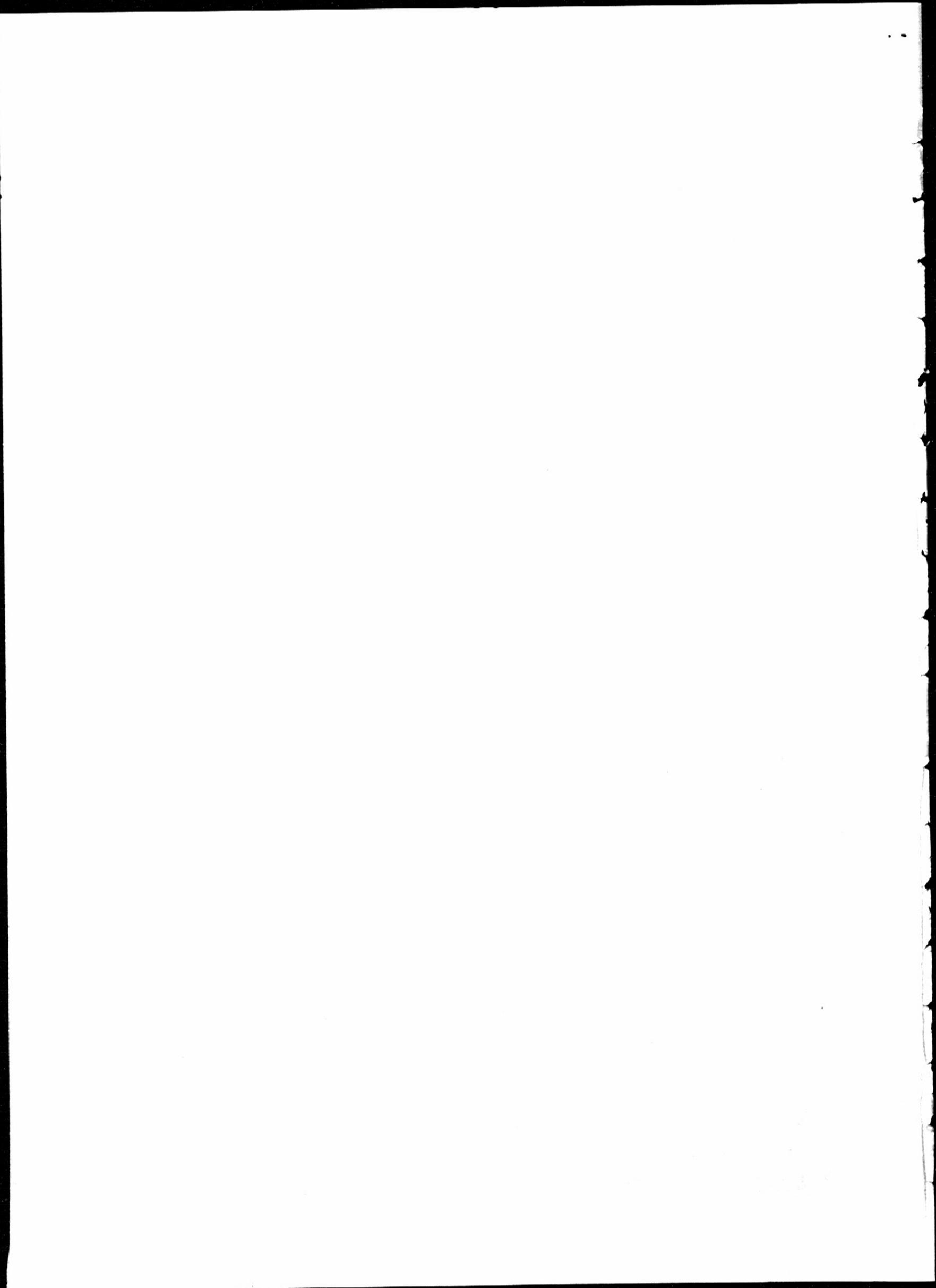
Although at the time of his arraignment appellant desired to retain counsel, he did not have sufficient funds to do so. He was not then apprised of the importance of having legal representation throughout the proceedings against him. The Court simply gave him a week to retain a lawyer and advised him that his case was set for trial in approximately six weeks. And even though appellant still had not retained a lawyer two weeks later, the Court did not appoint counsel to represent him. Surely, if an indigent defendant wants a lawyer and would prefer to retain one, but is unable to gather sufficient funds to do so, he should be assigned counsel. Otherwise his Sixth Amendment right is compromised by the insidious interaction of his poverty and his apparently misguided hopefulness.

Respectfully submitted,

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I hereby certify that the foregoing Reply Brief has been served upon the United States of America by delivering a copy, this 6th day of July, 1966, to the United States Attorney at his office in the United States Court House, Washington, D. C.

Benjamin W. Boley